
OPINION OF THE PUBLIC ACCESS COUNSELOR

NATHAN A. SLOAN,
Complainant,

v.

CITY OF MUNCIE,
Respondent.

Formal Complaint No.
18-FC-138

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the City of Muncie violated the Access to Public Records Act.¹ Attorney Karen E. Arland filed an answer to the complaint on behalf of Muncie. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on November 26, 2018.

¹ Ind. Code §§ 5-14-3-1, to -10

BACKGROUND

This case stems from a dispute between the Vice President of the Fraternal Order of Police Lodge 87 (“FOP”) and the City of Muncie (“City”) about access to a document referred to as the “Umbaugh Report.”

The City contracted with H.J. Umbaugh and Associates to provide financial advice with respect to budgetary matters, including its 2018 collective bargaining negotiations.

On November 7, 2018, Nathan A. Sloan (“Sloan”), Vice President of the Muncie FOP lodge, filed a written public records request with the City seeking the following:

Muncie City financial report (budget) prepared by Umbaugh and Associates. Any and all reports from this firm.

On November 15, 2018, the City, through its Personnel Director Sarah L.C. Beach, denied Sloan’s request in accordance with Indiana Code Section 5-14-3-4(b)(6), often referred to as the deliberative materials exception.

On November 26, 2018, Sloan filed a formal complaint with this Office alleging the City’s denial of his request constitutes a violation of the Access to Public Records Act.

In its answer, the City maintains that it has discretion under APRA’s deliberative materials exception to withhold the document known as the “Umbaugh Report.” The City contends as part of its engagement with Umbaugh, the company reviewed Muncie’s financial situation and developed various materials for City officials to use as they deliberated and considered the City’s options regarding collective bargaining negotiations with the FOP. Moreover, the City argues that

given the sensitive nature of its internal deliberation during those negotiations it is reluctant to provide further information about the contents of materials provided by Umbaugh.

ANALYSIS

The primary issue in this case is whether the City of Muncie has discretion under the Access to Public Records Act to withhold from disclosure the record requested by Sloan.

1. The Access to Public Records Act (“APRA”)

APRA expressly states that “(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” Ind. Code § 5-14-3-1.

The City of Muncie (“City”) is a public agency for the purposes of the APRA. Ind. Code § 5-14-3-2(n). That means unless an exception applies, any person has the right to inspect and copy the City’s public records during regular business hours. Ind. Code § 5-14-3-3(a). A request for inspection or copying must identify with reasonable particularity the record being requested. Ind. Code § 5-14-3-3(a)(1).

APRA has both mandatory and discretionary exemptions to the disclosure of public records. *See* Ind. Code §§ 5-14-3-4(a), (b). One category of records that may be withheld from disclosure at the discretion of the agency are those records categorized as deliberative materials. *See* Ind. Code § 5-14-3-4(b)(6).

This exception to disclosure is at the heart of this case.

2. Deliberative Materials Exception

The City maintains that it has discretion to withhold the Umbaugh Report requested by Sloan because it qualifies under APRA's disclosure exception for deliberative materials.

Under APRA, *deliberative material* includes records that are:

intra-agency or interagency advisory...including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.

Ind. Code § 5-14-3-4(b)(6). Deliberative materials include information that reflects, for example, one's ideas, consideration, and recommendations on a subject or issue for use in a decision making process.

The purpose of protecting such communications is to "prevent injury to the quality of agency decisions." *Newman v. Bernstein*, 766 N.E.2d 8, 12 (Ind. Ct. App. 2002). The frank discussion of legal or policy matters in writing might be inhibited if the discussion were made public, and the decisions and policies formulated might be poorer as a result. 766 N.E.2d at 12.

In order to withhold a public record from disclosure under Indiana Code Section 5-14-3-4(b)(6), the record must be interagency or intra-agency records of advisory or deliberative material *and* expressions of opinion or speculative in nature.

Granted, APRA's deliberative materials exception is broad and can be subject to abuse. Some have called it the exception that swallows the rule. Potential abuse notwithstanding, as the *Newman* court indicates, the exception has valuable and sound application and can certainly be exercised consistent with good governance and transparency principals.

In this case, the evidence submitted to this Office is scant so it is difficult to determine with any sort of precision whether the records at issue fit comfortably within the boundaries of the deliberative materials exception.

For example, the methodology behind the decision-making process, including financial modeling, formulas, calculations and procedures are generally considered deliberative in nature. They are not merely assessments of current conditions but forecasts based upon the proprietary acumen of H.J. Umbaugh and Associates.

To be sure, the deliberative materials exception extends to contractors' speculation, which is essentially what forecasting is—an estimate of future conditions. The materials in the Umbaugh Report likely includes budgetary projections predicated on those speculations and presumptions; and thus, may be properly categorized as deliberative material and withheld from disclosure under APRA.

However, the City offers no argument of the sort and does not provide any compelling or persuasive argument that the report contains any of these considerations.

Without more, the City's argument that the stewardship of public funds is of an inherently sensitive nature rings hollow. This Office simply cannot rubber-stamp an exemption to disclosure when a public agency does not carry its burden to explain why the exemption applies. We cannot ratify the City's actions without a compelling reason to apply a statute.

This Office exists, in part, to be a preliminary adjudicator of what constitutes an arbitrary application of a discretionary exemption to disclosure under APRA. While a trial court has the ultimate authority under Indiana Code Section 5-14-3-9(g)(2) to make that determination, the City should be mindful that a public agency carries the burden of proof to justify its actions in withholding public records to this Office as well. While we would love to simply take an agency at its word, that would be a disservice to the complaint process established by the Indiana General Assembly entrusted to the Public Access Counselor.

CONCLUSION

Based on the foregoing, it is the opinion of the Public Access Counselor that the City of Muncie has not sustained its argument that APRA's deliberative materials exception applies in this matter.

A handwritten signature in black ink, appearing to be 'LH Britt', written in a cursive style.

Luke H. Britt
Public Access Counselor